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Issue date: 12Dec2001

Case No.: 2001-BLA-00546

In the Matter of

WALTER KALOKITUS
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Helen M. Koschoff, Esq.
For Claimant

Donald Neely, Esq.
For the Director, OWCP

Before: Ralph A. Romano
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq (the Act). The Act provides benefits to persons totally disabled due to pneumoconiosis and to certain survivors of persons who had pneumoconiosis and were totally disabled from pneumoconiosis at the time of their deaths or whose deaths were caused by pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment, and is commonly referred to as black lung.

ISSUES

The issues remaining for adjudication are:

(1) the length of Claimant's coal mine employment,

(2) whether Claimant has pneumoconiosis,

(3) whether Claimant's pneumoconiosis arose out of coal mine employment,

(4) whether Claimant's total disability is due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Procedural Background

This proceeding arises from a second claim for benefits filed by Walter Kalokitus on August 26, 2000. (DX 1). Claimant's first claim, dated November 26, 1979, (DX 18-1), was closed following the September 16, 1981 denial by the Deputy Commissioner, Division of Coal Mine Workers' Compensation. (DX 18-21). Claimant's second claim for benefits was denied on December 8, 2000. (DX 16). At Claimant's request, the Director, Office of Workers' Compensation Programs, referred this case to the Office of Administrative Law Judges for a formal hearing. (DX 19). A hearing was held before me in Reading, Pennsylvania, on September 21, 2001, at which time all parties were given full opportunity to present evidence and argument as provided in the Act and the Regulations issued thereunder, found at Title 20, Code of Federal Regulations. The record was left open for a period of 21 days to permit Claimant to respond to a validation report submitted by the Director. (TR 36). Final proposed findings of fact and conclusions of law were received from the Director on November 9, 2001. Claimant's counsel did not submit a closing brief. This decision is based upon an analysis of the record, the arguments of the parties, and the applicable law.

Factual Background

Claimant was born on September 6, 1919 and has a high school education. His wife, Ann, is his only dependent for the purposes of the Act. (DX 6, 18-9). At the hearing, Claimant testified that his breathing problems began years ago and have gotten worse over time. (TR 18). He states his breathing problems prevent him from climbing more than a few steps without pausing, and that walking more than a few feet on level ground makes him tired and short of breath. *Id.* Claimant testified that he is unable to perform any housework at all and humid or cold weather tends to aggravate his breathing problems. *Id.* at 19. To help him breathe easier at night, Claimant sleeps elevated on four pillows. *Id.* at 23. He currently uses two inhalers and takes medication for his prostate gland. Other than his breathing difficulties, he has no other medical problems. *Id.* at 22. Finally, Claimant has no history of tobacco use. *Id.*

[1] The following references will be used herein: "TR" for the hearing transcript, "DX" for Director's exhibit, and "CX" for Claimant's exhibit.

Controlling Law

Claimant filed for benefits under the Act on August 26, 2000. (DX 1). Therefore, since this claim was filed subsequent to the effective date of the permanent criteria of Part 718, (i.e. March 31, 1980), the regulations contained in 20 C.F.R. Part 718 will govern its adjudication.[2] Since Claimant filed his second claim more than a year after the denial of his first claim, he is entitled to benefits if there has been a "material change" in his physical condition. *See* 20 C.F.R. § 725.309 (2000).[3] A claimant has shown a "material change" if he submits new evidence that establishes at least one of the elements previously adjudicated against him. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317-18 (3d Cir. 1996). If a "material change" is shown, the Administrative Law Judge must consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Id.*

Entitlement to Benefits: In General

Entitlement to benefits depends upon proof of three elements. In general, a miner must establish that: (1) he has pneumoconiosis which (2) arose out of his coal mine employment and (3) is totally disabled due to pneumoconiosis. Claimant must prove each of these elements by a preponderance of the evidence, *see Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994), and failure to do so precludes a finding of entitlement. *Perry v. Director, OWCP,* 9 B.L.R. 1-1, 1-2 (1986).

Entitlement: Determination of Pneumoconiosis

Claimant's first claim for benefits was denied, in part, because he did not establish that he had pneumoconiosis. (DX 18-17, 18-21). Therefore, I begin by examining the new evidence from Claimant on this issue. Pursuant to §718.202, a living miner can demonstrate pneumoconiosis by means of: (1) x-rays interpreted as being positive for the disease; or (2) biopsy evidence; or (3) the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concludes presence of the disease, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function studies, physical exams, and medical and work histories.

A. Chest X-Ray Evidence

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[2] Unless otherwise noted, all references are to the revised regulations that became effective January 19, 2001.

[3] The amended § 725.309 regulations do not apply since Claimant's application for benefits was pending as of January 19, 2001. *See* 20 C.F.R. § 725.2(c) (2001).

Chest x-ray interpretations were submitted into evidence which are relevant to the determination of whether Claimant has pneumoconiosis. The following is a listing of the admissible x-ray readings, together with the names and qualifications of the interpreting physicians:[4]

EXHIBIT	X-RAY DATE	DATE READ	DOCTOR	CONCLUSION
DX 18-14	**11/25/80**	11/25/80	J. Peralta bc	No Pneumoconiosis
DX 18-16		12/21/80	E. Dessen bc, b	No Pneumoconiosis
DX 12	**10/11/00**	10/11/00	R. Kraynak	Pneumoconiosis 1/2 Category p,q All six zones
DX 13		10/31/00	E. Sargent bc, b	No Pneumoconiosis
DX 25		3/20/01	P. Barrett bc, b	No Pneumoconiosis
DX 29		4/11/01	S. Navani bc, b	No Pneumoconiosis
DX 27		5/23/01	T. McLoud bc, b	No Pneumoconiosis
CX 9		2/28/01	H. Smith bc, b	Pneumoconiosis 1/0 Category p,s All six zones
CX 16		8/3/01	E. Cappiello bc, b	Pneumoconiosis 1/1 Category p, q All six zones
CX 16		8/7/01	K Pathak b	Pneumoconiosis 1/1 Category p, q All six zones
CX 16		8/13/01	T. Miller bc, b	Pneumoconiosis 1/0 Category p, q All six zones
CX 16		8/16/01	A. Ahmed bc, b	Pneumoconiosis 1/1 Category p, q All six zones
CX 16		8/21/01	E. Aycoth b	Pneumoconiosis 1/2 Category p, q All six zones
DX 32	**4/11/01**	4/27/01	S. Navani bc, b	Pneumoconiosis 0/1 Category s, p Four of six zones
DX 31		5/11/01	P. Barrett bc, b	No Pneumoconiosis

[4] The symbol "bc" denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. The symbol "b" denotes a physician who is an approved "B-reader" at the time of the x-ray reading. A B-reader is a radiologist who has demonstrated his expertise in assessing and classifying x-ray evidence of pneumoconiosis. These physicians have been approved as proficient readers by the National Institute of Occupational Safety & Health, U.S. Public Health Service pursuant to 42 C.F.R. § 37.51 (1982).

DX 33		5/17/01	E. Sargent bc, b	No Pneumoconiosis
CX 5		6/12/01	K. Pathak b	Pneumoconiosis 1/1 Category p, q All six zones
CX 5		6/14/01	E. Cappiello bc, b	Pneumoconiosis 1/1 Category p, q All six zones
CX 5		6/15/01	T. Miller bc, b	Pneumoconiosis 1/0 Category q, p All six zones
CX 5		6/21/01	E. Aycoth b	Pneumoconiosis 1/0 Category p, p All six zones
CX 5		6/27/01	A. Ahmed bc, b	Pneumoconiosis 1/1 Category q, p All six zones
CX 8		7/28/01	K. Mathur bc, b	Pneumoconiosis 1/0 Category q, t Four of six zones
CX 9		8/4/01	H. Smith bc, b	Pneumoconiosis 1/0 Category p, s All six zones

As pneumoconiosis is a progressive and irreversible disease, it is generally proper to accord more weight to the most recent x-rays of record. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-153 (1989)(en banc). Since the x-ray developed in connection with Claimant's first claim for benefits was taken over twenty years ago, I accord it very little weight. Of the physicians interpreting Claimant's October 11, 2000 x-ray, seven read it as positive for pneumoconiosis and four read it as negative. Of the physicians who reviewed Claimant's April 11, 2001 x-ray, seven diagnosed pneumoconiosis and three did not. The Director concedes that "based upon the evidence of record a finding can be made regarding the existence of pneumoconiosis." Director's Closing Br. ¶ 3 (November 9, 2001). Therefore, I find that Claimant has established the presence of pneumoconiosis pursuant to 20 C.F.R. § 718.202. Since this has now been established, Claimant has proven a "material change" in his physical condition. *See Labelle Processing*, 72 F.3d at 317-18. Accordingly, I must review all the evidence of record to see if Claimant is entitled to benefits under the Act. *Id.*

Length of Coal Mine Employment

The claimant must be a "coal miner" to recover benefits under the Act and also bears the burden of proof in establishing the length of his employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34, 1-36 (1984). Claimant's coal mine work history must be computed in accordance with 20 C.F.R. § 725.101(a)(32) in order to determine if he is entitled to any of the presumptions contained in Part 718. 20 C.F.R. § 718.301. To the extent the evidence permits, the Administrative Law Judge must ascertain the beginning and ending dates of all periods of coal mine employment ("CME"). 20 C.F.R. § 725.101(a)(32)(ii).

Under the new regulations, a year of CME "means a period of one calender year . . . , or partial periods totaling one year, during which the miner worked in or around coal mines for at least 125 'working days.'" 20 C.F.R. § 725.101(a)(32). A "working day" is any day or part of a day for which a miner received pay for work as a miner. *Id.* If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calender year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. 20 C.F.R. 725.101(a)(32)(i). If a miner worked fewer than 125 working days in a year, he shall be credited for working a fractional year based on the ratio of the actual number of days worked to 125. *Id.*

The Benefits Review Board has held that such computations should be based on some reasonable method with the result supported by substantial evidence in the record considered as a whole. *Wilkerson v. Georgia Pacific Corp.*, 1 B.L.R. 1-830, 1-835 (1978). The length of coal mine employment may be established exclusively by the claimant's own testimony where it is uncontradicted and credible. *Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343, 1-345 (1984). However, Social Security records may be accorded more weight if a claimant's testimony is unreliable. *Tackett v. Director, OWCP*, 6 B.L.R. 1-839, 1-841 (1984).

Claimant testified that, at age sixteen, he began working in the coal industry for Stanley Kowaleski. (TR 10-11). Every week during the school year he would work after school on Friday and all day Saturday. *Id.* In the summer months he worked six days a week for eight to nine hours a day. *Id.* The majority of his work consisted of underground mining activities. *Id.* at 12. Upon graduation from high school in 1939, Claimant began working full-time (six days a week) for Mr. Kowaleski. *Id.* at 13-14. Claimant testified that he was unsure when he stopped working for Mr. Kowaleski, but he believes that it was around 1942 or 1943. *Id.* at 15.

Claimant submitted affidavit forms in conjunction with his first application for benefits in 1980.[5] Stanley Kowaleski simply noted that Claimant worked for him from 1934 to 1942. (DX 18-3). Claimant's own affidavit states that he worked for "Johnson Coal" from March 1934 to May 1942. (DX 18-4). On another employment history form submitted with this application, he lists his coal mine employment as going from March 1937 to April 1942. (DX 18-2). Newly submitted affidavits from Clem Dadurka, Metro Zavarich, Isabel Remetta, and Helen Zereconski support that he began work at the age of sixteen and that he worked for Mr. Kowaleski *until* 1942. (CX 3, 11). Social Security records support the proposition that Claimant could have worked up to 1942 since they show that he received wages from Sun Ship Inc. in Philadelphia, PA in the first quarter of that year. (DX 4). These records also show that Claimant received wages from Sieburg Buffet Company in Spring Lake, NJ during the third quarter of 1938 and the third and fourth quarters of 1939. *Id*. Claimant also worked for

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[5] Affidavits may be considered in determining the length of a claimant's coal mine employment despite the hearsay character of the evidence. *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188, 1-192 (1983).

Gibralter Manufacturing Company of Plainfield, NJ in the first and second quarters of 1940.[6] *Id.*

Claimant testified that after being discharged from the military in August of 1946, he returned to the coal industry working for Kurp Coal Company. (TR at 15). Claimant states that he worked full-time for Kurp Coal for "about three years or so." *Id.* at 16-17. Since Claimant did not specify what 'full-time' meant in this instance, I will assume that it means five days a week. Claimant also testified that "I think I worked with Mike Subick . . . [for] about a year," doing underground mining work. *Id.* at 16. Claimant believes he left the coal industry for good some time around 1951. *Id.* The CM-911a form that Claimant filled out with his most recent claim gives a similar account of his coal mine employment history. (DX 2).

An affidavit from Anthony Kurp, submitted in conjunction with his first application for benefits, states that Claimant worked for him from April 1946 to November 1948. (DX 18-5). Claimant's own affidavit states that he worked for Kurp Coal Company from April 1946 to November 1948. (DX 18-4). On another employment history form submitted with this application, he lists his coal mine employment as going from September 1946 to November 1948. (DX 18-2). The affidavits of Isabel Remetta and Helen Zereconski state that Claimant worked for "Kurp Coal Company and then for Mr. Subick for about 2 ½ - 3 years from 1946-1948 and part of 1950." (CX 3). Another from Robert Shuey states that Claimant worked in coal mines "from approximately 1946-1948 and part of 1950." (CX 3). The Dadurka and Zavarich affidavits state that Claimant worked in the coal industry for "another 2-3 years" after being discharged from the Army in 1946. The Social Security records show no earnings for 1946, 1947, and the first quarter of 1948. (DX 4). However, these records do show that he received earnings from Sun Ship Inc., and Sun Oil Co., for the last three quarters of 1948 and all of 1949. *Id*. Claimant also received earnings from Hempt Brothers and United Refractory Construction Co. in the last three quarters in 1950. *Id.* Finally, Claimant received wages from Achenbach & Butler Incorporated in Philadelphia, PA and Austin Company in Cleveland, OH for all four quarters of 1951. *Id.*

Since Claimant's testimony appears somewhat unreliable in light of the conflicting evidence presented, I accord greater weight to Claimant's Social Security records when the evidence conflicts. *See Tackett*, 6 B.L.R. at 1-841. Based upon the evidence of record and the applicable regulations, I find that Claimant has established eight years and five months of coal mine employment.[7]

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[6] The Dadurka, Zavarich, Remetta, and Zereconski affidavits also state that Claimant worked for brief periods for Sieburg and Gibralter. (CX 3, 11).

[7] Based on Claimant's testimony, the starting date for calculating his CME is September, 1935, the date he turned sixteen. His testimony establishes 34 'working days' for September, October, November and December of 1935. This translates to 3 months coal mine employment for 1935. *See* 20 C.F.R. § 725.101(a)(32). Claimant is credited for a full year of coal mine employment for 1936 and 1937 since he worked more than 125 'working days' each year. *Id.* The evidence establishes 94 'working days' for 1938 which translates to 9 months coal mine employment. *Id.* The evidence establishes 68 'working days' in 1939 which translates to 7 months of coal mine employment. He is credited

Entitlement: Determination of Causal Relationship

Claimant must establish that his pneumoconiosis arose at least in part out of coal mine employment. 20 C.F.R. § 718.203(a). Since Claimant has less than ten years of coal mine employment, "competent evidence" must show that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment. *Shoup v. Director, OWCP*, 11 B.L.R. 1-110, 1-112 (1987). Claimant cannot meet his burden without presenting medical evidence on this issue. *See Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986).

Claimant was examined on December 4, 1980 in connection with his prior claim for benefits. (DX 18-12). He was examined by Dr. Walter Luschinsky who diagnosed "anthrasilicosis I.L.O. Class 0." *Id.* However, Dr. Luschinsky concluded that Claimant was not disabled due to anthrasilicosis and gave no opinion regarding causation. *Id.*

In reports dated October 17, 2000, July 19, 2001, and August 6, 2001, Dr. Raymond Kraynak opined that the cause of Claimant's pneumoconiosis is exposure to coal dust. (DX 12); (CX 4, 12). Dr. Kraynak is board eligible in family medicine and approximately half of his practice is devoted to the treatment of black lung disease. (CX 4);(CX 7 at 4). He noted that Claimant worked as a coal miner for eleven years, has no history of tobacco use, and was involved in the construction industry subsequent to his coal mine employment. (CX 4).

In letters dated August 6, 2001 and August 13, 2001, Dr. Matthew Kraynak states that the cause of Claimant's pneumoconiosis is exposure to coal dust. (CX 10, 13). Dr. Kraynak took into account that Claimant has never smoked, has an eleven year history of underground coal mine work, and subsequently worked in the construction industry as a foreman. (CX 10). Furthermore, he states that his opinion as to the cause of Claimant's pneumoconiosis would not change even if he is credited with less than ten years of coal mine employment. (CX 13).

The Director contends that the opinions of Drs. Raymond and Matthew Kraynak should be accorded little weight because they rely upon "exaggerated" assessments of Claimant's coal mine employment and they fail to address the possible implications of Claimant's employment in the construction industry.[8] Director's Closing Br. ¶ 4 (November 9, 2001). The Director asserts that

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for a full year of coal mine employment in 1940 and 1941 since he had more than 125 'working days' each year. *Id.* The evidence establishes he had 100 'working days' in 1946 which translates into 10 months coal mine employment. Claimant is credited for one year for 1947 since he had more than 125 'working days' during the year. Claimant is credited for 130 'working days' for the first quarters of 1948 and 1950 which totals one year of coal mine employment.

[8] The Director also contends that Dr. Matthew Kraynak's August 6, 2001 report fails to specify what type of work Claimant performed in the mines and as a laborer in the construction industry. Director's Closing Br. ¶ 4 (November 9, 2001). However, Dr. Kraynak specifically notes under "occupational history" that Claimant's coal mine

Claimant's actual coal mine employment was closer to five years. Since I have credited Claimant with almost eight and a half years of coal mine employment, reliance upon an eleven year history is not significant enough to detract from either opinion. *See Rickey v. Director, OWCP*, 7 B.L.R. 1-106, 1-108 (1984)(ALJ not required to discredit opinion based on erroneous coal mine employment history if discrepancy is considered). The Director fails to point to any evidence that would make Claimant's history of construction labor relevant to the issue of causation. On cross-examination, Claimant denied that he was exposed to any kind of dust after he left the coal industry. (TR 26). Other than the simple fact that he worked in the construction industry, there is no evidence of dust exposure. Therefore, the fact that Dr. Matthew Kraynak and Dr. Raymond Kraynak do not state the effect of Claimant's construction employment does not diminish the weight of their opinions.

Dr. Stephen Kruk rendered an opinion that Claimant "is totally and permanently disabled secondary to coal workers' pneumoconiosis." (CX 6). The Director's only quarrel with Dr.Kruk's opinion is that he failed to specifically state how he concluded that this was caused by Claimant's coal mine employment. Director's Closing Br. ¶ 5 (November 9, 2001). Contrary to the Director's assertion, Dr. Kruk specifically stated that Claimant worked in underground mines "for [over ten] years, exposing him to much smoky, dusty, air pollution." (CX 6). He also noted that Claimant has no history of tobacco use. *Id.* Therefore, despite the lack of precise wording, it appears that Dr. Kruk is of the opinion that Claimant's pneumoconiosis is a result of exposure to coal dust.

Dr. Michael Green issued a report based on his examination of Claimant on May 5, 2001. (DX 21). He noted a coal mine employment history of nine years and the fact that Claimant has never smoked. *Id.* He noted that he could not exclude a fibrosis or pneumoconiosis of the lung. *Id.* He listed the etiology of this diagnosis as "indeterminate," but stated that he could not exclude coal dust exposure as a possible cause. *Id.*

At the hearing, Claimant testified that he was exposed to a great deal of dust during his coal mine employment. (TR 17). Three physicians have concluded that Claimant's pneumoconiosis was caused by exposure to coal dust and a fourth physician could not exclude it as the cause. There is no medical opinion in the record that states that Claimant's pneumoconiosis is related to some other source. Dr. Luschinsky did not diagnose pneumoconiosis and therefore his opinion is of no value. *See Trujillo v. Kaiser Steel Corp.*, 8 B.L.R. 1-472, 1-473 (1986)(opinion on causation entitled to no weight because based upon premise of no pneumoconiosis). Therefore, I find that competent evidence establishes that Claimant's pneumoconiosis is significantly related to exposure to coal dust while employed as a coal miner. *See Shoup*, 11 B.L.R. at 1-112.

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employment was "underground" and that "he was required to crawl, lift, climb, bend, stoop, and lift up to 150 pounds throughout his work day." He went on to state that Claimant "then went to work in the construction industry, as a foreman, distributing materials to laborers, and lifting up to 50 pounds." Therefore, I do not find the weight of Dr. Kraynak's opinion to be diminished on this basis.

Entitlement: Determination of Total Disability Due to Pneumoconiosis

Claimant must also establish that he is totally disabled due to pneumoconiosis in order to be eligible for benefits under the Act. 20 C.F.R. § 718.204(a).

A. Total Disability

Total disability may be proven by: 1) pulmonary function studies which reveal a qualifying value for the FEV1 test, plus either a qualifying value for the FVC test, or the MVV test, or the result of the FEV1 divided by FVC is less than or equal to 55%;[9] or 2) arterial blood gas studies which reveal qualifying values;[10] or 3) medical evidence of cor pulmonale; or 4) a reasoned medical opinion which concludes total disability, if the opinion is based on medically acceptable clinical and laboratory diagnostic techniques. 20 § C.F.R. 718.204(b).

1. Pulmonary Function Studies

Pulmonary function study (PFS) results were submitted for evaluation on the issue of total disability under § 718.204(b)(2)(i). If there are conflicting reports of the claimant height in the pulmonary function study reports, I am required to resolve the discrepancy. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983). Claimant's height has been reported twice as 68 inches, twice as 67 inches, and once as 68.5 inches. (DX 7, 18-10, 22); (CX 3, 17). For the purpose of determining which pulmonary function studies are qualifying, I find that Claimant's height is 67.7 inches. The pulmonary function study results are summarized in the table below:[11]

EXHIBIT	**DATE**	**DOCTOR**	**AGE**	**FEV1** PRE/POST	**FVC** PRE/POST	**MVV** PRE/POST	**FEV1/FVC** PRE/POST	**QUALIFY** PRE/POST

[9] "Qualifying values" for the FEV1, FVC, and the MVV tests are those results which are less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

[10] "Qualifying values" for arterial blood gas studies are those which reveal qualifying results as specified in Appendix C to Part 718.

[11] Before and after values are indicated if a bronchodilator was administered at the time of the test.

DX 18-10	11/25/80	Luschinsky	61	3.02	3.61	104[12]	83%	NO
DX 7	10/11/00	Kraynak	81	1.07 / 2.10	2.54 / 2.66	60 / 68	42% / 78%	YES / NO
DX 22	4/11/01	Green	81	2.14 / 1.99	2.71 / 2.39	50 / 24	79% / 83 %	NO
CX 3	5/9/01	Kraynak	81	.94	1.69	44	56%	YES
CX 17	8/21/01	Kraynak	82	.78	2.49	47.72	31%	YES

Since this case arises within the jurisdiction of the Third Circuit, I must consider whether the pulmonary function studies of record are in "substantial compliance" with the quality standards of Part 718.[13] *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). In making this determination, I must consider the medical opinions of record regarding the reliability of each study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131, 1-133 (1986). Except in limited circumstances, if a pulmonary function study is not in substantial compliance with the applicable quality standards, it may not constitute evidence of total disability. *See* 20 C.F.R. § 718.101(b); 65 Fed. Reg. 79920, 79927 (December 20, 2000).

In connection with his first claim for benefits, a PFS was performed by Dr. Walter Luschinsky on November 25, 1980. (DX 18-10). This study was subsequently validated by Dr. Leon Cander. (DX 18-11). Since no evidence has been presented to the contrary, I find this study to be in substantial compliance with the Part 718 quality standards in effect at the time. *See* 20 C.F.R. pt. 718 (2000).

Claimant's October 11, 2000 pulmonary function study was performed by Dr. Raymond Kraynak. (DX 7). Dr. Kraynak noted that Claimant's test cooperation and comprehension were "good," and he diagnosed "severe air flow defect." *Id.* Dr. David Prince subsequently deemed this study "acceptable" without explanation. (CX 17). Dr. Prince is a Clinical Assistant Professor of Medicine at Jefferson Medical College and is board certified in internal, pulmonary disease, and critical care medicine. *Id.* At his deposition, Dr. Kraynak stated that this test is acceptable since it was properly administered, the tracings continue for at least five seconds, the tracings plateau, and there were three reproducible efforts. (CX 7 at 10).

Dr. Michael Sherman, who is board certified in internal, pulmonary disease, and critical care medicine, (DX 9), reviewed the October 11, 2000 PFS. (DX 8). He currently holds a position as an Associate Professor of Medicine at the Medical College of Pennsylvania and Hahnemann University

[12] A MVV of 208 was recorded at the time of the study, (DX 18-10), but a validation report indicated that this value was incorrect due to a miscalculation. (18-11).

[13] Pulmonary functions studies developed after January 19, 2001 are subject to the revised Part 718 quality standards. 20 C.F.R. § 718.101 (2001).

School of Medicine, and is a Medical Director of the Pulmonary Diagnostic Laboratory and Department of Pulmonary Services at Hahnemann University Hospital. *Id.* Dr. Sherman states that the tracings indicate poor and inconsistent efforts on the pre-bronchodilator study. (DX 8). He noted that the post-bronchodilator study was less than six seconds and there was no plateau. *Id*. Finally, he indicates that there are only two reproducible efforts. *Id.* For these reasons, Dr. Sherman is of the opinion that this study is invalid. *Id.*

Dr. Sherman's opinion raises legitimate questions as to the reliability of the October 11, 2000 PFS. *See* 20 C.F.R. Part 718, app. B, § (2)(ii)(A)-(G) (2000). Although Dr. Prince is as qualified as Dr. Sherman, Dr. Prince failed to provide any explanation as to why he found this PFS acceptable, and therefore his opinion not well reasoned. *C.f. Gambino v. Director, OWCP*, 6 B.L.R. 1-134, 1-139 (1983)(noting that an explanation must accompany an opinion invalidating an otherwise unquestioned pulmonary function study). In addition to the criticisms of Dr. Sherman, Dr. Kraynak failed to explain the significance of post-bronchodilator results as required by 20 C.F.R. § 718.103(c) (2000). In fact, he did not even acknowledge that non-qualifying values were obtained after a bronchodilator was administered. (CX 7 at 9). Dr. Sherman's superior qualifications also entitles his opinion to more weight than Dr. Kraynak's. *See Burns v. Director, OWCP*, 7 BLR 1-597, 1-599 (1984)(physician qualifications are relevant in assessing the respective probative values to which their opinions are entitled). Therefore, I find the October 11, 2000 PFS does not substantially comply with the Part 718 quality standards.

Claimant's April 11, 2001 PFS was ordered by Dr. Michael Green. (DX 22). Dr. Green is board certified in internal and pulmonary medicine. (DX 24). He completed a visiting fellowship in pulmonary medicine at Columbia University and Presbyterian Hospital, and is currently a pulmonary internist at Sunbury Community and Shamokin State General hospitals. (DX 24). The technician who administered the test noted that Claimant's cooperation was good, but his comprehension was only fair, possibly due to his hearing impairment. *Id.* She also noted that his effort was sub-optimal, but that it might have been due to his persistent cough and difficulty hearing. *Id.* Upon review, Dr. Green reported that the results demonstrate a "mild reduction of the forced vital capacity with preservation of the . . . FEV1." *Id.* He went on to state that the results are "skewed somewhat" by a sub-optimal effort on the part of the Claimant. He also stated that "[t]he results suggest that there is a preservation of airflow, although flow parameters may be an underestimate of the true values because of sub-optimal effort." *Id.* Finally, the report states that Claimant had difficulty with the exercise portion of the test and had to stop after two and a half minutes due to shortness of breath and a choking feeling. *Id.*

Dr. Prince reviewed this PFS and states that it is not acceptable since there are "no MVV tracings." (CX 17). However, Dr. Prince provides an invalid basis for deeming this PFS unacceptable. The FEV1, FVC, and FEV1/FVC results are the only ones that *must* be included in a pulmonary function study report. *See* 20 C.F.R. § 718.103(a). In terms of the MVV test, the regulations merely state that *if* it is reported, the results must be obtained independently rather than calculated from the results of the FEV1. 20 C.F.R. § 718.103(a). Therefore, failure to attach the MVV tracings is not an

adequate basis for Dr. Prince to invalidate the entire study. However, I will not consider the MVV values of this test in my decision since the tracings are not attached. *See* 20 C.F.R. § 718.103(b).

Dr. Raymond Kraynak also reviewed this study and stated that it is not acceptable due to Claimant's persistent cough, hard of hearing, choking feeling, and shortness of breath during the study. (CX 7 at 13). Even so, he stated that if this study was deemed valid it would still support the presence of a disabling respiratory condition since "[t]he values are markedly reduced." *Id.* However, since neither Dr. Prince nor Dr. Green felt the problems noted by Dr. Kraynak worthy of mention, I do not find Dr. Kraynak's opinion sufficient to invalidate this PFS. Therefore, I find that the April 11, 2001 PFS is in substantial compliance with the regulations.

Claimant's May 9, 2001 PFS was performed at the behest of Dr. Kraynak. (CX 3). The technician who performed the test noted that Claimant's comprehension was good, but that he had difficulty performing the actual maneuvers. *Id.* This study was deemed acceptable by Dr. C. Vaughn Strimlan. (CX 15). Dr. Strimlan is the Medical Director of the Respiratory Therapy Program at Wheeling College/Mercy Hospital and is board certified in internal and pulmonary medicine. *Id.* He states that the tracings reveal "comparable effort and cooperation," multiple reproducible FVC maneuvers, and the MVV is consistent with the FEV1 value. *Id.* He concluded by stating that "this is a valid study [and] it appears to conform to the Federal Black Lung Guidelines." *Id.* He also noted that this PFS shows a restrictive ventilatory pattern. *Id.* Dr. Raymond Kraynak also felt this study was valid since from his review the two largest FEV1's vary by less than 100 ml. (CX 7 at 11). He also notes that the MVV shows a "severe disability." *Id.*

Dr. John Michos reviewed this PFS and found it to be unacceptable. (DX 35). Dr. Michos is Board Certified in internal and pulmonary medicine. *Id.* He is also the Director of Pulmonary Services and the Pulmonary Function Lab at Riverside Tappahannock Hospital. *Id.* In his opinion, Claimant's effort, cooperation and comprehension were sub-optimal due to a greater than a five percent variation between the two largest FEV1 values. *Id.*

Dr. Michos and Dr. Strimlan have similar qualifications and I find their opinions to be of equal weight. When Dr. Kraynak's opinion is taken into account, the evidence does not establish that this PFS is invalid. Therefore, I find that the May 9, 2001 pulmonary function study substantially complies with the quality standards of Part 718.

Claimant's August 21, 2001 PFS was performed by Dr. Raymond Kraynak who noted that Claimant's effort, cooperation, and comprehension were good. (CX 17). He noted "severe restrictive defect" on the report. *Id.* Dr. Michos reviewed this study and deemed it unacceptable due to a greater than five percent variation between the two largest FEV1 values, and sub-optimal MVV and flow volume loops. (DX 39). Dr. Kraynak validates his own test by stating that from his review, the two largest FEV1 values vary by less than 100 ml and there was good effort throughout the study maneuvers. (CX 20). He argues that Dr. Michos is not considering the entire sentence in Appendix B

that states that "[t]he variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater." (CX 20); 20 C.F.R. Part 718, app. B, § (2)(ii)(G) (2001).

It does not appear that Dr. Michos did not consider the 20 C.F.R. Part 718, app. B, § (2)(ii)(G) in its entirety. Although he does not explicitly state this, it may be inferred that Dr. Michos is of the opinion that the more than five percent variation is greater than 100 ml. Just as it may inferred from Dr. Kraynak's opinion that the greater than five percent variation does not exceed 100 ml, even though he does not explicitly state this. Even so, since Dr. Michos credentials are superior to Dr. Kraynak's, I accord his opinion more weight. Therefore, I find that the August 21, 2001 PFS does not substantially comply with the quality standards of Part 718.

An administrative law judge may accord more weight to the results of a recent pulmonary function study over those of an earlier study. *See Coleman v. Ramey Coal. Co.*, 18 B.L.R. 1-9, 1-14 (1993). Since Claimant's first PFS was performed more than twenty years ago, I accord it less weight than more recent studies. Of the four recent pulmonary function studies of record, only two are valid and reliable. Of these, one produced results sufficient to establish total disability and one did not. (CX 3); (DX 22). Therefore, I find that Claimant has not established total disability according to 718.204(b)(2)(i) by a preponderance of the evidence.

2. Arterial Blood Gas Studies

Arterial blood gas studies (ABG) were also submitted for evaluation of total disability under § 718.204(b)(2)(ii). The study results are summarized below:

EXHIBIT	**DATE**	**PHYSICIAN**	**pCO2** (REST/EXERCISE)	**pO2** (REST/EXERCISE)	**QUALIFY**
DX 18-13	11/25/80	Luschinsky	28 (R)	67 (R)	YES
DX 11	10/17/00	R. Kraynak	38 (R) 32 (E)	77 (R) 110 (E)	NO
DX 23	4/11/01	Green	39.2 (R) 29.2 (E)	102.3 (R) 123.1 (E)	NO

Since Claimant's first ABG was performed over twenty years ago I accord it less weight. *See Schretroma v. Director, OWCP*, 18 B.L.R. 1-19, 1-22 (1993). Since the other ABG's of record do not reveal qualifying values as determined by Appendix B to 20 C.F.R. Part 718, I find that Claimant has not established total disability according to § 718.204(b)(2)(ii).

3. Cor Pulmonale

Claimant may also establish total disability by providing medical evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. § 718.204(b)(2)(iii). However, Claimant did not submit any evidence on this issue.

4. Medical Opinions

Where total disability cannot be shown by pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale, it may be established by reasoned medical opinion that is based on medically acceptable clinical and laboratory diagnostic techniques.[14] 20 C.F.R. § 718.204(b)(2)(iv). A physician's opinion must be documented in order for it to be considered reasoned. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987).

Dr. Green submitted a report based on his examination of Claimant on May 2, 2001. (DX 21). Dr. Green recorded a nine year history of underground coal mine employment and noted that Claimant's last coal mine job involved mining, timbering, and drilling. *Id.* He reported that Claimant has no history of tobacco use. *Id.* Claimant presented with complaints of daily wheezing, dyspnea, cough, orthopnea, paroxysmal nocturnal dyspnea. *Id.* Claimant also told Dr. Green that he must rest after walking half a block or climbing four steps, and that he is unable to lift more than eight pounds. *Id.* Dr. Green's physical examination revealed Claimant's extremities to be white in color with no clubbing or edema. *Id.* Auscultation of Claimant's chest was clear. *Id.* Dr. Green relied upon Claimant's April 11, 2001 chest x-ray, pulmonary function study, and ABG study in making his diagnosis. *Id.* Dr. Green opined that Claimant's April 11, 2001 x-ray report indicated "increased interstitial lung markings" therefore he could not exclude fibrosis or pneumoconiosis of the lung. *Id.* He also noted non-cardiopulmonary diagnoses of bilateral carotid bruits[15] and testicular atrophy on the right side. *Id.* However, he concluded that Claimant is able to perform his last coal mine job and therefore is not disabled. *Id.* Since Dr. Green has adequately documented the medical data he relied upon, and this data is reliable, I find that his opinion is reasoned.

Dr. Stephen Kruk, who is board certified in internal medicine, submitted a report dated July 11, 2001 based upon his examination of Claimant. (CX 6). Claimant told him that he has experienced severe shortness of breath for the past ten to fifteen years and feels it is getting progressively worse. *Id.* Dr. Kruk relied upon an underground coal mine employment history of over ten years. *Id.* Claimant

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[14] In rendering an opinion on total disability, a physician must determine whether a claimant's respiratory or pulmonary impairment prevents him from performing his usual coal mine work and "from engaging in gainful employment in the immediate area of his . . . residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he . . . previously engaged with some regularity over a substantial period of time." 20 C.F.R. § 718.204(b)(1)(i)-(ii); § 718.204.(b)(2)(iv).

[15] A carotid bruit is a systolic murmur heard at the root of the neck (over a carotid artery) that is produced by turbulence from a blockage of blood flow in the vessel which can indicate carotid artery occlusive disease. Graham Dark, *On-Line Medical Dictionary* <http://www.graylab.ac.uk/omd/index.html> (accessed Nov. 29, 2001).

informed Dr. Kruk that he subsequently worked in construction until 1990, but that he was not exposed to any air pollution. *Id.* He also told him that he cannot walk more than one city block, or climb a flight of steps, without having to stop and catch his breath. *Id.* Dr. Kruk also noted that Claimant complained of a productive cough and occasional nocturnal dyspnea. *Id.* He noted the fact that Claimant has never used tobacco. *Id.* Dr. Kruk's physical exam revealed that Claimant's lower extremities have no peripheral edema and his lungs "have somewhat coarse breath sounds but are generally clear in all fields." *Id.* Dr. Kruk relied upon Claimant's May 9, 2001 PFS and an interpretation by Dr. Kraynak of Claimant's October 11, 2000 chest x-ray. *Id.* Dr. Kruk also had Claimant undergo a treadmill stress test to assess his degree of dyspnea with exertion. *Id.* He noted that Claimant could only go for two minutes before having to stop due to severe shortness of breath. *Id.* Finally he recorded that Claimant's EKG response to exercise was basically unremarkable. *Id.* Based on this evidence, Dr. Kruk concluded that Claimant "is totally and permanently disabled secondary to coal workers' pneumoconiosis." *Id.*

Even though Dr. Kruk relied upon a coal mine history slightly longer than what Claimant has been credited with, the difference is not significant enough to undermine the reasoning of his opinion. *See Rickey*, 7 B.L.R. at 1-108. Furthermore, despite the fact that he relied upon an x-ray interpretation by Dr. Raymond Kraynak (who is neither a certified radiologist, diagnostic roentgenologist, nor a certified A, B, or C reader), the other record x-ray evidence adequately supports Dr. Kraynak's positive reading. Therefore, I conclude that Dr. Kruk's opinion is documented and reasoned.

Dr. Raymond Kraynak rendered an opinion in this case through a series of letters, reports, and deposition testimony. (CX 4, 7, 12); (DX 10). He states that Claimant has been under his care since October 11, 2000. (CX 7 at 7). Dr. Kraynak relies upon an eleven year history of underground coal mine employment. (DX 10); (CX 4); (CX 7 at 8). Claimant has complained to him of shortness of breath, wheezing, productive cough, dyspnea on exertion, and difficulty walking 1 to 2 blocks or up one flight of steps without experiencing shortness of breath. (DX 10); (CX 7 at 7); (CX 4). Dr. Kraynak also notes that Claimant has no history of tobacco use. (DX 10); (CX 4); (CX 7 at 8). According to Dr. Kraynak, Claimant's heart rate is normal, but he looks older than his age and his lips are cyanotic. (CX 4); (CX 7 at 8). Dr. Kraynak states that examinations of Claimant's lungs reveal scattered wheezes but no rales or rhonchi. (DX 10); (CX 4); (CX 7 at 8). In making his diagnosis, Dr. Kraynak reviewed pulmonary function studies dated October 11, 2000, May 9, 2001, and April 4, 2001. (DX 10); (CX 4); (CX 7 at 9-12). However, Dr. Kraynak did not rely upon the April 4, 2001 study based upon his own opinion that it was invalid. (CX 7 at 13). He also reviewed the October 17, 2000, and April 4, 2001 ABG studies. (DX 10); (CX 7 at 9, 11). However, he attributes no medical significance to the April 4, 2001 ABG because he feels the results indicate that Claimant was hyperventilating during the test and adequate exercise was not induced. (CX 7 at 12). Dr. Kraynak also reviewed all the interpretations of Claimant's October 11, 2000 and April 4, 2001 chest x-rays. (DX 10); (CX 3); (CX 7 at 10-11). Dr. Kryanak stated that there is no acute pathology from his review of Claimant's EKG. (CX 7 at 9). He also reviewed the medical opinions of Dr. Kruk and Dr. Green. *Id.*

at 11. At his deposition, he acknowledged that Dr. Sherman noted an abnormal EKG, but dismissed this diagnosis by stating "he's 81 years old and, by definition, is going to have some abnormalities in his electrocardiogram." *Id.* at 10. He went on to state that he feels that Claimant's heart is not affecting his ability to breathe or his pulmonary capacity. *Id.* at 10-11. Dr. Kraynak's overall opinion is that Claimant is totally and permanently disabled due to coal workers' pneumoconiosis. (DX 10); (CX 4, 12); (CX 7 at 14).

In a letter dated August 6, 2001, Dr. Kraynak states that Claimant's last coal mine employment required him to crawl, climb, bend, stoop, and lift and carry weights up to 150 pounds. (CX 12). He also states that Claimant "then went to work in non-coal mine employment as a building construction foreman, which required him to distribute materials to laborers and lift and carry weights up to 50 pounds." He then stated that this fact would not change his opinion in this matter. (CX 12).

By his reports, letters, and deposition, Dr. Kraynak has adequately documented the medical evidence he relied upon. Even though Dr. Kraynak relied upon the invalid October 11, 2000 PFS, and dismissed the results of the valid April 4, 2001 PFS, he also relied upon the results of the May 9, 2001 PFS which is valid. In addition, I find his reliance upon 11 years of CME, rather than the almost eight and a half years I credited Claimant with, does not significantly detract from the weight of his opinion. *See Rickey*, 7 B.L.R. at 1-108. Overall, Dr. Kraynak's opinion is supported by reliable medical evidence and I find his opinion to be adequately reasoned.

Dr. Matthew Kraynak submitted an opinion via a report dated August 6, 2001 and a letter dated August 13, 2001. (CX 10, 13). In his report, Dr. Kraynak states that he has seen Claimant "on several occasions." (CX 10). Dr. Kraynak reported that Claimant complained of exertional dyspnea, productive cough, shortness of breath, and difficulty walking more than a block or up a flight of steps without experiencing difficulty breathing. *Id.* He relied upon an eleven year history of underground coal mine employment and noted that this work required him to crawl, lift, climb, bend, stoop, and lift up to 150 pounds throughout his workday. *Id.* Dr. Kraynak relied upon Claimant's May 9, 2001 PFS and a May 23, 2001 chest x-ray interpreted as positive for pneumoconiosis.[16] *Id.* His physical examinations reveal that Claimant "looks older than his stated age," his lips are cyanotic, but his extremities show no signs of edema. *Id.* Dr. Kraynak noted that Claimant's lungs showed scattered wheezes in all lung fields but no rales or rhonchi. *Id.* He also recorded that Claimant had a normal heart "rate and rhythm with no murmurs, thrills, rubs, S3's or S4's present."[17] *Id.* Based upon this evidence Dr. Matthew Kraynak concluded that Claimant is "totally and permanently disabled secondary to coal workers' pneumoconiosis." *Id.* In a supplemental letter dated, August 13, 2001, Dr. Kraynak stated that even if

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[16] I note that no x-ray dated May 23, 2001 was submitted in this case.

[17] An "s3 gallop" finding may indicate congestive heart failure and an "s4 gallop" finding may indicate myocardial disease or hypertension.
Graham Dark, *On-Line Medical Dictionary* <http://www.graylab.ac.uk/omd/index.html> (accessed Nov. 29, 2001).

Claimant is credited with less than ten years of coal mine employment, it is still his opinion that he suffers from pneumoconiosis. (CX 13).

Based on the data contained in his report and letter, Dr. Matthew Kraynak has adequately documented his opinion. Even though he relied upon an x-ray interpretation that is not part of the final record, it does not undermine his reasoning because the record contains sufficient x-ray evidence to support a finding of pneumoconiosis. Therefore, I find that Dr. Matthew Kraynak's opinion is adequately reasoned.

In connection with Claimant's prior claim, a medical opinion was submitted by Dr. Walter Luschinsky. (DX 18-12). Dr. Luschinsky opined that Claimant was not disabled due to anthrasilicosis. *Id.* In conjunction with the present claim, Dr. Sherman submitted his medical opinion in a report dated December 7, 2000. (DX 15). However, he did not render an opinion on total disability since he concluded that Claimant does not have pneumoconiosis. *Id.* Therefore, I do not accord their opinions any weight on the issue of total disability. *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 822 (4th Cir. 1995)(medical opinions tainted by underlying conclusion of no pneumoconiosis may be accorded little probative value); *Trujillo v. Kaiser Steel Corp.*, 8 B.L.R. 1-472, 1-473 (1986)(opinion on causation of pneumoconiosis entitled to no weight because based upon premise of no pneumoconiosis).

Dr. Raymond Kraynak and Dr. Matthew Kraynak claim that Claimant has been under their care for treatment of his pneumoconiosis. Medical opinions from treating physicians developed after January 19, 2001 must be given special consideration under the revised Part 718 regulations. *See* 20 CFR §§ 718.101, 718.104 (2001). Specifically, I must consider the nature and duration of the relationship, and the frequency and extent of treatment given by the physician. 20 C.F.R. § 718.104(d)(1)-(4). The overall goal of this inquiry is to determine if a physician's relationship with a claimant has allowed him to gain a superior understanding of his condition. *See id.*

Dr. R. Kraynak testified that Claimant has been under his care since October 11, 2000.[18] (CX 7 at 7). However, Dr. R. Kraynak testified that he has seen Claimant on only one other occasion since then. (CX 7 at 19). As for Dr. M. Kraynak, there is no evidence as to the duration or frequency of his treatment of Claimant other than the statement in his report that he has seen him "on several occasions."(CX 10). From the evidence, it does appear that both doctors have been treating Claimant for his respiratory problems during this time. (CX 7 at 17);(CX 13). Dr. M. Kraynak's August 6, 2001 report shows that his treatment of Claimant consists of a physical examination, review of the May 9, 2001 PFS, and review of a positive x-ray interpretation. (CX 10). The evidence shows that Dr. R.

[18] Except for his report of October 17, 2000, all of Dr. R. Kraynak's Reports were developed after the effective date of the revised regulations. (DX 10); (CX 4, 7, 12). However, even before the new regulations, ALJ's had discretion to accord greater weight to a treating physicians opinion in appropriate circumstances, so this report would have been analyzed in a similar fashion regardless. *See, e.g., Onderko v. Director, OWCP*, 14 B.L.R. 1-2, 1-6 (1989).

Kraynak's treatment of Claimant has consisted of physical examinations, performance of an ABG, performance of two pulmonary function studies, and an x-ray interpretation. (CX 7 at 9-11).

Based upon the apparently limited nature of Dr. M. Kraynak's contact with Claimant, I do not feel that he has a superior understanding of his condition. In addition, despite Dr. R. Kraynak's more extensive testing of Claimant, I do not feel that two examinations over a one year period enables him to understand Claimant's condition better than any other physician of record. Therefore, I find that this is not an appropriate circumstance to give controlling weight to the opinions of these physicians based upon their status as Claimant's treating physician. *See* 20 C.F.R. § 718.104(d)(5).

Overall, Dr. Kruk, Dr. R. Kraynak, and Dr. M. Kraynak are of the opinion that Claimant is totally disabled due to pneumoconiosis. Dr. Green's documented and reasoned opinion is that Claimant is not disabled. Even though Dr. Green possesses superior qualifications to these physicians, I am not required to accord his opinion controlling weight on this basis. *See Fields*, 10 B.L.R. at 1-21. The opinions of Drs. Kruk, R. Kraynak, and M. Kraynak are also documented, reasoned, and are supported by reliable medical data. Therefore, I find that a preponderance of the medical opinion evidence shows that Claimant is totally disabled.

B. Total Disability Due to Pneumoconiosis

A claimant's total disability is due to pneumoconiosis if it "is a substantially contributing cause of the [claimant's] totally disabling respiratory or pulmonary impairment." *See* 20 C.F.R. § 718.204(c)(1). In this case, Claimant must show that his pneumoconiosis "has a material adverse effect" on his respiratory condition. *See* 20 C.F.R. § 718.204(c)(1)(i). Claimant must establish this by a physician's documented and reasoned medical opinion. *See* 20 C.F.R. § 718.204(c)(2).

In documented and reasoned opinions, Dr. Kruk, Dr. R. Kraynak, and Dr. M. Kraynak all state that Claimant is totally disabled due to pneumoconiosis. (DX 10); (CX 6, 10). Dr. Green's diagnosis was that Claimant is not disabled, (DX 21), and therefore his opinion is entitled to little weight. *See Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995). Based on the medical opinion evidence of record, I find that Claimant's pneumoconiosis is a substantially contributing cause to his total disability.

Since Claimant has established the final element of his case, as determined under the criteria in §718.204(c)(1), I find that he is entitled to benefits under the Act.

Onset Date

Under § 725.503(b) benefits are payable beginning with the month of onset of total disability due to pneumoconiosis. Where the evidence does not establish the month of onset, benefits begin from the month in which the second claim was filed. In the instant case, the record does not conclusively

establish the date of onset of disability. Therefore, since this claim was filed on August 26, 2000, benefits will begin as of August 1, 2000.

ORDER

Accordingly, the Director, OWCP, shall:

(1) Pay Walter Kalokitus all benefits to which he is entitled under the Act, augmented by reason of his wife, Ann, commencing as of August 1, 2000;

(2) Pay Claimant's attorney, Helen M. Koschoff, Esquire, fees and expenses to be established in a supplemental decision and order.

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RALPH A. ROMANO
Administrative Law Judge

Attorneys Fees

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Director. Claimant's attorney has not submitted her fee application. Within thirty (30) days of the receipt of this Decision and Order, she shall submit a fully supported an fully itemized fee application, sending a copy thereof to Director who shall then have fifteen (15) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing.

NOTICE OF APPEAL RIGHTS:

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, DC, 20210.